Provisional

For participants only

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International Law Commission
Seventieth session (second part)

Provisional summary record of the 3444th meeting
Held at the Palais des Nations, Geneva, on Monday, 6 August 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (*continued*) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.918. He recalled that paragraphs 11 and 12 had been left in abeyance.

C. *Recommendation of the Commission*

Paragraph 11

The Chair said that a proposal by the Special Rapporteur for the paragraph had been circulated among members in all the official languages of the United Nations under the symbol ILC(LXX)/INFORMAL/3. The paragraph would read:

"11. At its … meeting, on … 2018, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) Take note of the draft conclusions of the International Law Commission on the identification of customary international law in a resolution, annex the draft conclusions to the resolution, and ensure their widest dissemination;

(b) Commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

(c) Take note of the bibliography prepared by the Special Rapporteur;

(d) Take note of the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

(e) Follow up the suggestions in the Secretariat memorandum by:

(i) calling to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) requesting the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law, including their timely publication; and

(iii) also requesting the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) through an online database to be updated periodically based on information received from States, international organizations and other entities."

Sir Michael Wood (Special Rapporteur) said that, in the light of the discussion that had taken place at the previous meeting, he wished to propose three minor changes. First, he proposed that, in subparagraph c., the word "note" should be used instead of "take note of" and that a footnote reference to the source of the bibliography, namely document A/CN.4/717/Add.1, should be added at the end of subparagraph. Secondly, in subparagraph d., the words "take note of" should again be replaced with "note", the idea being that subparagraphs c. and d. would best be noted by the General Assembly in a preambular paragraph of a resolution, rather than taken note of formally in an operative paragraph. Thirdly, at the very end of subparagraph e. (iii), he proposed the addition of the word "concerned" and a reference to paragraphs 7 to 10 of document A/CN.4/710, which made

clear which Member States, other States, entities and learned societies had been consulted by the Secretariat. In particular, mention was made, in paragraph 8, of "all entities in the United Nations system and all entities and organizations which … had received a standing invitation to participate as observers in the sessions and the work of the General Assembly". The first line of paragraph 11 would need to be completed with the appropriate meeting number and date.

Mr. Nolte said that, while he agreed with the proposal for the paragraph, he wondered at what point the draft conclusions would become conclusions. By the time the report of the Commission on the work of its seventieth session came to be published, the Commission would have completed its work on the texts, which it would thus no longer consider as drafts. Given that the texts were not designed to serve as the basis for a treaty, they would not be viewed as drafts by States, either. If the Commission's adoption of the texts on second reading was what transformed them from draft conclusions into conclusions, the correct status of the texts should be reflected in paragraph 11.

Mr. Huang, referring to the Chinese version, said that the translation of subparagraph a. was inaccurate and gave the impression that the resolution mentioned was a resolution of the Commission, rather than of the General Assembly. It would be helpful, in that regard, to clarify the wording of the subparagraph in the English original. He agreed with the three changes proposed by the Special Rapporteur, which addressed the points he had raised at the previous meeting.

The Chair proposed that, to respond to Mr. Huang's concern, the words "in a resolution" should be moved from their current position and placed after the words "take note".

Mr. Vázquez-Bermúdez said that it would be more accurate to speak of "conclusions" than "draft conclusions".

The Chair said that, when products that were not intended to serve as the basis for a treaty, such as conclusions, guidelines and principles, came to be sent to the General Assembly, it made sense for the qualifier "draft" to be dropped.

Mr. Llewellyn (Secretary to the Commission) said that, regardless of the product, the Commission's practice was to describe texts as drafts until the General Assembly had annexed them to a resolution and commended them to the attention of States.

The Chair said that the act of annexation by the General Assembly did not transform draft texts into texts. In any event, the Commission's practice should be followed.

Mr. Murphy said that, at least in theory, the General Assembly might decide that it was not entirely happy with the Commission's work and send it back for further modifications. Although such a scenario was unlikely, it would be presumptuous of the Commission to assert that its work on a particular product was done until the General Assembly had reached a decision thereon.

He wondered what implications the proposed amendment to subparagraph a. would have for the other subparagraphs. To his knowledge, it was not only subparagraph a. that the Commission wished to see addressed in a resolution of the General Assembly.

Sir Michael Wood (Special Rapporteur) said that it was well understood that subparagraphs a. and b., which contained fairly standard language, would be reflected in the operative part of a resolution, whereas subparagraphs c. and d. were likely to be addressed in the preamble. It remained to be seen how subparagraph e. would be dealt with, but the proposed amendment to subparagraph a. would have no implications in that respect.

The Commission should not distinguish between its differently named products, all of which should be described as drafts when they came to be submitted to the General Assembly.

Paragraph 11, as amended, was adopted.

Mr. Jalloh said that the memorandum by the Secretariat entitled "Ways and means for making the evidence of customary international law more readily available" should

have been the subject of a more in-depth discussion during the current session, especially in view of the fact that the Commission's previous study on the issue had been conducted in 1950. The Commission's mandate for such a discussion was clearly established in article 24 of its statute.

He was grateful to the Special Rapporteur for accommodating his proposal to encourage the timely publication of United Nations publications providing evidence of customary international law. He noted, in that regard, that a number of documents were outdated. For example, as far as he could tell, the Repertory of Practice of United Nations Organs had last been published in 2009, while the Repertoire of the Practice of the Security Council had not been updated since 2013. His hope and understanding was that the Commission would not wait another 68 years to give effect to article 24 of its Statute. With that in mind, it should set aside some time, ideally at its seventy-first session, for a substantive discussion on the availability of evidence of customary international law, the lack of which represented a real challenge for many countries, especially in Africa.

The Chair said that the Commission would have benefited from having at least one additional week of meeting time during the current session.

D. Tribute to the Special Rapporteur

Paragraph 12

The Chair said that the beginning of the paragraph would read: "At its 3444th meeting, held on 6 August 2018,".

Paragraph 12 was adopted by acclamation.

Document A/CN.4/L.918 as a whole, as amended, was adopted.

Chapter V of the draft report as a whole, as amended, was adopted.

Sir Michael Wood (Special Rapporteur) said that he would like to thank all those who had contributed to what was very much a collective work, in particular the Chair and all the other members of the Commission, past and present. A special word of thanks was due to Mr. Jalloh and his predecessors as Chair of the Drafting Committee, and to Mr. Vázquez-Bermúdez, who had chaired the working group on commentaries. He mentioned the special role of two past members of the Commission: Mr Candioti who, as Chair of the Working Group on the Long-term Programme of Work, had always been very encouraging; and Mr Forteau, who had been instrumental in revising the title of the topic. He also thanked the Secretariat, and especially David Nanopoulos and, before him, Gionata Buzzini, the author of the memorandum entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic". He owed a great debt to his assistants in the Commission, and first and foremost to Omri Sender, who had arrived in Geneva on the very day that the topic had been placed on the Commission's programme of work and who had stayed with the project throughout.

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to consider chapter IV of its draft report, beginning with the text contained in document A/CN.4/L.917.

A. Introduction

Paragraph 1

Mr. Murphy proposed that, in the first sentence, which was a little confusing, the words "at its sixty-first session" should be deleted, and the words "at its following session" should be inserted after "establish".

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 5

Paragraphs 2 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted.

Paragraph 9

Paragraph 9 was adopted, subject to its completion by the Secretariat.

Paragraph 10

Paragraph 10 was adopted.

C. Recommendation of the Commission

Paragraph 11

Paragraph 11 was left in abeyance.

D. Tribute to the Special Rapporteur

Paragraph 12

Paragraph 12 was left in abeyance.

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

The Chair invited the Commission to consider the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One (Introduction)

Commentary to draft conclusion 1 (Scope)

Paragraphs (1) and (2)

Mr. Tladi said that, in the third sentence of paragraph (1), the words "authorities and examples" should be replaced with "aspects", as it was not the draft conclusions themselves that provided authorities and examples, but the commentaries thereto.

It was so decided.

Mr. Murphy proposed that the order of paragraphs (1) and (2) should be reversed, in line with what had been done in relation to a recent topic.

Paragraphs (1) and (2) were adopted on that understanding.

Paragraph (3)

Mr. Park said that the third sentence was more or less repeated elsewhere in the document, including in paragraphs (1) and (13) of the commentary to draft conclusion 5. He wondered whether such repetition was necessary.

Mr. Murphy said that, in the second sentence, it might be preferable to say "one aspect not dealt with generally" rather than "one aspect not dealt with specifically," as international organizations were discussed to some extent. For the sake of clarity, he proposed splitting footnote 2 in two: a full stop should be inserted after the citation to the 1986 Vienna Convention and the words "this does not exclude that" deleted. The new second sentence should then read: "Some materials relating to such treaties, but which are also of general relevance, are used in these commentaries."

Paragraph (3), as amended by Mr. Murphy, was adopted.

Paragraph (4)

Mr. Park said that, in the second sentence, the phrase "as well as for non-State actors and all others who are called upon to interpret treaties" was unclear. He proposed deleting the words "and all others" and adding the word "concerned" after "non-State actors".

Mr. Nolte (Special Rapporteur) said that, in his view, it was important to retain the reference to "all others". In the context of the topic of identification of customary international law, the Commission had adopted in its recommendation to the General Assembly the formulation that it should commend the conclusions and commentaries thereto "to the attention of States and all who may be called upon to identify rules of customary international law". The draft conclusions under discussion were aimed at all those who were called upon to interpret treaties, not only non-State actors but also others who were not established as organizations, even private individuals. The addition of the word "concerned" seemed to introduce an unnecessary restriction. He would therefore prefer to retain the original formulation of the sentence.

Mr. Murphy said that, if the Special Rapporteur wished to follow the approach taken in the topic of identification of customary international law, it should be recalled that in that context reference had simply been made to "other entities" and not to "non-State actors and other entities". The formulation "non-State actors and all others" was confusing, as it was not clear who the "others" were. He therefore proposed deleting the words "for non-State actors and all" so that the phrase would simply read "as well as others who are called upon to interpret treaties".

Sir Michael Wood said that he agreed with Mr. Murphy but would favour keeping the word "all" before "others".

Mr. Saboia said that he supported the language proposed by the Special Rapporteur and saw no problem with the reference to "non-State actors".

Mr. Nolte (Special Rapporteur) said that he did not believe there was any need to enter into questions of principle on that point; he would not oppose the deletion of the reference to non-State actors, although he saw no particular reason for doing so. He drew attention to the formulation used in draft conclusion 5 (2) — "other conduct, including by non-State actors" — which introduced the same distinction.

Mr. Tladi said that, while he agreed with the reasoning put forward by both sides and would accept any of the proposals, as they were substantively the same, he believed that Mr. Murphy's proposal captured the idea and did not exclude non-State actors, since they were included in the formulation "all others". The text of draft conclusion 5 (2) did not refer to the "conduct of others, including non-State actors," but rather to "other conduct, including by non-State actors".

Mr. Zagaynov said that he supported Mr. Murphy's proposal.

The Chair said that, if he saw no objection, he would take it that the Commission wished to adopt the paragraph with the amendment proposed by Mr. Murphy and further modified by Sir Michael Wood.

Mr. Nolte (Special Rapporteur) said that, as he considered that point to be of minor importance in that particular instance, he would go along with the proposal, but without prejudice to the treatment of issues relating to non-State actors or others in different contexts.

Paragraph (4), as amended, was adopted.

The commentary to draft conclusion 1 as a whole, as amended, was adopted.

Part Two (Basic rules and definitions)

Commentary to draft conclusion 2 (General rule and means of treaty interpretation)

Paragraph (1)

Mr. Tladi said that he had already discussed his proposal with the Special Rapporteur, who had strong opposing views on the matter. The third sentence — "First, article 31, as a whole, is the 'general rule' of treaty interpretation" — was, of course, based on the title of article 31 of the 1969 Vienna Convention. His proposal was to add a second sentence to footnote 3, to read: "See, however," followed by a reference to views expressed in the literature that the general rule was not article 31 as a whole, but rather article 31 (1). The references he proposed to cite were from the chapter that he had authored, "Interpretation of Treaties in an International Law-Friendly Framework: the case of South Africa", in the book co-edited by the Special Rapporteur, *The Interpretation of International Law by Domestic Courts*, and from a book by Dörr. The Special Rapporteur had expressed the concern that such an approach — mentioning the opposing views of certain members in the commentary — was usually only followed on first reading. If that was the issue, he would be happy to exclude the reference to the chapter he had written and to instead cite another author who had expressed the same view. He believed it would be appropriate in that instance to refer to the chapter he had authored simply because it dealt specifically with the draft conclusion that had been adopted provisionally in 2016. Reference had been made on previous occasions to differing views in the literature. In fact, paragraph (4) of the commentary to draft conclusion 3 included the formulation "notwithstanding the suggestions of some commentators," accompanied by a rather lengthy list of writings in footnote 47. It was only fair to make readers aware that the approach adopted by the Commission was not the only one, even if it was indicated that the Commission believed those alternative views were wrong. That would in no way detract from the Commission's work. He reiterated that it was only fair to let readers know that different views existed.

Sir Michael Wood said that it was not only the Commission, but also the States that had adopted the Vienna Convention, which had agreed to the title of article 31. He would be opposed to trying to attenuate what seemed to be an important point that should be stated clearly. He was in favour of maintaining the text as originally drafted.

Mr. Nolte (Special Rapporteur) said that the footnote, which referred to the title of article 31 of the Vienna Convention, was obviously correct. He recalled that, in 1966, the Commission had explained in the commentary to the draft articles on the law of treaties why it had chosen "general rule" as the title of article 31. It had stated:

> "The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus Article 27 is entitled 'General *rule* of interpretation' in the

> singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."

That text was quoted later in the commentaries in connection specifically with the interaction between the different means of interpretation. There had been multiple debates on how to situate paragraph 1 in relation to the other articles, and the formulation that appeared in the text of the commentary under consideration had been agreed on by all members in 2016, including Mr. Tladi. He did not believe it would be appropriate to reopen that debate and introduce a controversial element into the text at that late stage. Mr. Tladi's proposal could give rise to misunderstandings rather than additional clarity. He therefore shared Sir Michael Wood's view and did not wish to make any changes to the sentence or the footnote.

Mr. Tladi said that, although he understood that his proposal was unlikely to be accepted, he wished to put his views on record. In fact, the reference from the chapter that he had written that he had wished to have cited in the footnote included the same sentence just quoted by the Special Rapporteur from the Commission's 1966 commentary. The proposed citation then continued:

> "In the view of this author, Art 31 (3) constitutes part of the general rule in the sense that it contributes to, or facilitates, the determination of the meaning of the terms of the treaty, in good faith, in their context and taking into account the object and purpose of the treaty. It is for this reason that the injunction in Art 31 (3) is for the interpreter to *take into account* subsequent agreements, subsequent practice, and relevant rules of international law, while there is an absolute obligation in Art 31 (1) to give effect to the ordinary meaning of the terms, in their context and taking into account the object and purpose of the treaty. Thus, to borrow from the words of the Commission in 1966, there is a 'single combined operation' in which the subsequent practice and subsequent agreements are applied to give effect to the ordinary meaning of the terms of the treaty, in their context and in the light of the object and purpose of the treaty."

It was merely an attempt to understand what was meant by the title of article 31. From his perspective, it would be a shame for the Commission to pretend that the view it expressed in the commentary about the title of article 31 was the only one. In seeking to hide the fact that there were alternative views on the matter, the Commission would give the impression that it was unsure of its own arguments and did not want objective readers to be able to see different views and to make a determination for themselves.

Mr. Nolte (Special Rapporteur) said that the fact that the Commission did not quote the views of all authors in the commentary did not mean that there was any attempt to hide them. In fact, for some topics, the Commission quoted no academic literature at all. Once one went deeper into a particular question, one would always find authors who held different views; it was simply a question of whether the Commission wished to highlight them. It was not clear what the practical consequences of Mr. Tladi's proposal would be. He would not support changing the text, which had already been adopted by the Commission multiple times.

Mr. Murphy said that his understanding of the general rule in article 31 might well encompass what Mr. Tladi was talking about, namely that there was, to a certain degree, a dominant focus on paragraph 1. He would be happy to support the Special Rapporteur's preference to retain the current paragraph as originally drafted but was sympathetic to Mr. Tladi's point that in other parts of the commentaries there did seem to be an acknowledgement of minority views or views that the Commission itself had not adopted. He would prefer in those situations to also exclude the alternative views because they were not part of what the Commission was attempting to put forth.

Mr. Tladi said that his proposal was of practical significance for two reasons. First, as the Commission now attached almost as much importance to the commentary as to the draft conclusions themselves, what was said in the commentary now carried more weight. While he might have paid less attention to such points in the past, as in 2016 when the commentary had been adopted on first reading, it was much more difficult to do so at the

current juncture. Second, it seemed that the Commission was elevating subsequent practice and subsequent agreements and stating that, in certain instances, subsequent agreements were conclusive. He was concerned that, as a result, no real distinction was being made in terms of weight between article 31 (1) and 31 (3). However, he would not stand in the way of a consensus.

The Chair said that, on that understanding, he took it that the Commission wished to adopt paragraph (1) as originally drafted.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy said that, as the second sentence was very long and somewhat complicated, his proposal was to split it in two. The words "the application of" should be inserted before "the primary means of interpretation according to article 31" and the words "set forth in article 32" should be added after "supplementary means of interpretation," followed by a full stop. The words "to which" would then be deleted at the beginning of the next sentence, which would read: "Recourse may be had to the supplementary means of interpretation" and continue to the end as originally drafted.

Paragraph (3), as amended, was adopted with a minor editorial change to footnote 6.

Paragraph (4)

Mr. Murphy proposed deleting the parentheses in the middle of the final sentence, as the bracketed text was an important clause. At the very end of the paragraph, the words "for the States parties concerned" should be added after the phrase "entry into force of the Vienna Convention," as it was not the entry into force of the Convention itself that was at issue, but the entry into force for States that ratified the Convention, possibly at a much later stage.

Mr. Jalloh said that, for the sake of clarity and precision, in the third sentence the word "in particular" before the list of courts and tribunals should be replaced with "for instance" to indicate that it was a non-exhaustive list of examples.

Sir Michael Wood said that, in the first sentence, the word "enshrined" should be replaced with "set forth".

Mr. Nolte (Special Rapporteur) said that he agreed with the proposals by Sir Michael Wood and Mr. Murphy and, in principle, with Mr. Jalloh's suggestion, although he would prefer "for example" to "for instance".

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

Paragraph (9) was adopted with a minor editorial amendment.

Paragraph (10)

Mr. Murphy said that the second sentence of paragraph (10) appeared to claim that subsequent practice not in application of the treaty might be relevant, thereby contradicting what was said in the first sentence. Since it would be preferable to leave the issue open, he wished to propose the insertion of the words "it is possible that" at the beginning of the second sentence and the deletion of the word "however". In the last sentence, the words

"requires that" should be replaced with "refers to", in order to better reflect the fact that the Commission was indicating its conclusions with regard to the law.

Mr. Nolte (Special Rapporteur) said that he failed to understand what the insertion of the phrase "it is possible that" would add in terms of the meaning of the sentence. Contrary to Mr. Murphy's assumption, the Commission was not taking a position on the issue, as reflected by the use of the word "may". With regard to Mr. Murphy's second proposal, in his opinion the words "requires that" could not give rise to any misunderstanding.

Sir Michael Wood said that, while he agreed with the deletion of the word "however", he was not in favour of the other proposed amendments to the second sentence. He supported the proposed amendment to the last sentence, which did not change the original meaning.

Mr. Murphy said that the second sentence, both in its original formulation and in the version proposed by Sir Michael Wood, was inconsistent with the first sentence. Since the Commission had decided to elevate the commentaries almost to the same level as the draft conclusions, the second sentence was inappropriate and should therefore be either deleted or softened to indicate that the Commission was not taking a position on the question. As it stood, it appeared that the Commission was taking a position; that was completely wrong, since the Commission had not analysed the question and did not view it as part of the project under consideration.

Mr. Nolte (Special Rapporteur) said that the first sentence made clear that the question was not addressed in the draft conclusions themselves; whether the Commission should explain in the commentaries the relationship between certain aspects of the topic was a separate issue. The same approach had been adopted in the context of the topic of the identification of customary international law. The proposal was not a far-reaching one; indeed, article 32 of the 1969 Vienna Convention spoke of supplementary means of interpretation in a very general way. That phenomenon was very close to subsequent practice not in the application of the treaty; there was therefore no risk in saying that in certain circumstances it might be relevant. The formulation had been agreed on first reading without much debate.

Mr. Tladi said that he supported Mr. Murphy's position. There were other instances where the commentaries dealt with issues that were not covered by the draft conclusions; since the commentaries had been elevated it was not appropriate to address in them issues that were not squarely within the scope of the topic.

Mr. Murphy said that the only support offered for the case that subsequent practice by States parties not in the application of the treaty constituted relevant practice in respect of article 32 appeared in footnote 24, in a reference to the Special Rapporteur's own book. Although he himself would prefer to delete the second sentence altogether, he had simply proposed softening it in order to capture the meaning intended by the Special Rapporteur. The point merited consideration since Governments had reacted to it after the first reading. The objective on second reading was to take account of the views that Governments had put forward; in the case under consideration some had reacted adversely. His original proposal therefore constituted a satisfactory means of attempting to retain the point in a manner that was responsive to the views received.

Mr. Nolte (Special Rapporteur) said that the scope of the topic was defined by its title and the question under discussion fell squarely within that. The citation in footnote 24 referred to the work of an esteemed colleague in a book he had edited, rather than to his own writings. If it would allay Mr. Murphy's concern, he was prepared to add a reference to the International Court of Justice, which had taken into account in the interpretation of treaties, reports by States which had not been agreed to by another State. As far as he was aware, the only Government that had reacted adversely to the point after the first reading was that of the United States of America.

Mr. Saboia said that if Governments had reacted to the point, that reaction should be acknowledged and taken into account on second reading. It was unclear whether by dealing with the question in the manner adopted in paragraph (10) the Commission was

engaging in progressive development in terms of the understanding of the law on the application of the Vienna Convention and the understanding of that instrument.

Mr. Rajput said that the deletion of the word "also" in the second sentence might perhaps go some way to addressing Mr. Murphy's concern, since it would lessen the connection with practice not in application of a treaty.

Sir Michael Wood proposed that, in the second sentence, the word "relevant", should be replaced with "possible".

The Chair said that it was his understanding that the members agreed that the second sentence should be amended to read: "Such practice may, under certain circumstances, also be a possible supplementary means of interpretation".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murphy proposed that, in the first sentence of paragraph (11), the word "complete" should be replaced with "end".

Paragraph 11, as amended, was adopted.

Paragraph (12)

Mr. Murphy said that, in the first sentence of paragraph (12), the word "on" should be replaced with "involving". Footnote 29 should be deleted, since it was another example of a situation in which the Commission had not accepted or pursued the consideration of a particular question.

Mr. Nolte (Special Rapporteur) said that the second sentence of the paragraph, to which footnote 29 referred, simply said that the Commission had not considered it necessary to include a reference; it did not say that it had found the idea questionable. The section of his first report referred to in footnote 29 compared various means of interpretation in order to arrive at a certain result; it was helpful to the reader and there was no reason to delete it.

Sir Michael Wood said that he found it odd to include in commentaries references to Special Rapporteurs' reports; it was much better for commentaries to be self-contained. As a compromise, the footnote could simply make reference to paragraphs 8 to 28 of the Special Rapporteur's first report, without the inclusion of the quote.

Mr. Nolte (Special Rapporteur) said that, while he could accept Sir Michael Wood's proposal, the Commission should be wary of stating general rules about references to the reports of Special Rapporteurs. If his memory was correct, the Commission had just adopted commentaries on the topic of the identification of customary international law that contained such references.

The Chair said that he took it that the members accepted Sir Michael Wood's proposal regarding footnote 29.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

Mr. Murphy said that, for the sake of clarity, the third sentence of paragraph (14) should be reformulated to read: "The interpreter should identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing a proper emphasis on them in good faith."

Mr. Nolte (Special Rapporteur) said that he was not in favour of Mr. Murphy's proposal as it involved not merely stylistic changes but also substantive ones. The sentence sought to explain a rule of interpretation under the Vienna Convention that must — and not

simply should — be followed. Mr. Murphy had not explained why he wished to delete, for example, the words "as required by the rule to be applied"; the principle of good faith was not merely an abstract principle, it could acquire a specific meaning when seen from the perspective of the rule concerned.

Mr. Murphy said that the intended meaning of the first part of the sentence was not clear. Did the phrase "rule to be applied" refer to the rules set forth in the Vienna Convention, the rule of the treaty being interpreted or some other rule of international law relating to good faith?

Mr. Nolte (Special Rapporteur) said that sentences should not be read in isolation. The sentence in question followed on from the previous sentence, which stated: "This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation." The following sentence emphasised the point that the interpreter was not free and should be guided by certain factors; it was an important point to make since it was sometimes said that rules on interpretation had little content. It was important that the Commission should make, and substantiate, the statement that the interpreter was not free and that articles 31 and 32 of the Vienna Convention had meaning. Although in his opinion it was already explicit, the word "treaty" could be added before "rule".

Sir Michael Wood said that, as the first part of the sentence was particularly obscure, it should be amended to read: "The interpreter needs to identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing ...".

It was so decided.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted with some minor editorial amendments.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Commentary to draft conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation)

Paragraph (1)

Mr. Rajput said that the use of the word "significant" in the first sentence of paragraph (1) seemed to assign a primordial role to subsequent agreements and subsequent practice, which was inappropriate, as they were but one means of interpretation of treaties. It was only in paragraph (4) that it was made clear that there was no hierarchy among the means referred to in article 31 of the 1969 Vienna Convention on the Law of Treaties. Given the structure of the commentary to draft conclusion 3 as a whole, and the fact that paragraph (1) was an introductory paragraph, he proposed replacing the phrase "the reason why those means are significant" with "its role".

Mr. Nolte (Special Rapporteur) said that he did not support the proposal made by Mr. Rajput. It was not the role of subsequent agreements and subsequent practice that was being described as authentic. In the *travaux préparatoires* relating to articles 31 and 32 of the 1969 Vienna Convention, it was clear that subsequent agreements and subsequent practice had been identified as belonging in the general rule of interpretation precisely because they were an authentic means of interpretation. That did not mean that other means of interpretation were insignificant. The relationship between subsequent agreements and subsequent practice and other means of interpretation had already been dealt with in draft conclusions 1 and 2. Draft conclusion 3 was the place in the commentary where it was explained why subsequent agreements and subsequent practice, in particular, were relevant and how so.

Mr. Rajput said that to his mind there was a difference in meaning between the words "significant" and "relevant", the latter of which did not denote more or less

significance and was therefore more appropriate. There was no need to overemphasize the role of subsequent agreements and subsequent practice in the introductory paragraph (1).

Sir Michael Wood proposed that, in the first sentence of the paragraph, the quotation marks around the phrase "authentic means of interpretation" might be better placed around the single word "authentic". He further proposed that the phrase "the reason why those means are significant for the interpretation of treaties" might be reworded to read "why they have an important role in the interpretation of treaties".

Mr. Nolte (Special Rapporteur) said that he would object to using, in the current sentence, the word "relevance" because it was also used in connection with article 32 of the 1969 Vienna Convention, on supplementary means of interpretation, whereas the sentence currently under discussion referred to the primary means of interpretation identified in article 31 of the Convention. With regard to the amendment proposed by Sir Michael Wood, the word "important" was equivalent to the word "significant" in the sentence in question; he could therefore accept the proposal.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted with some minor editorial amendments.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that the reference to draft conclusion 9 should be replaced with a reference to draft conclusion 10.

Sir Michael Wood suggested replacing, in the first sentence, the word "character" with "characterization". In the third sentence, he proposed deleting the words "or legally blinding", which might be confusing for readers.

Mr. Murphy said that similar language appeared in the first sentence of the paragraph. He would therefore propose deleting both occurrences of the phrase "or legally binding", unless Sir Michael Wood had a reason for wishing to retain the first.

Sir Michael Wood said that both instances of the phrase "or legally binding" should be deleted.

Mr. Nolte (Special Rapporteur) said that he agreed with the correction to the reference to draft conclusion 9 and also with the substitution of the word "character". As for the amendment proposed by Sir Michael Wood, the expression "conclusive, or legally binding" had been used by the Commission in the 1960s. In his view, there was no harm in retaining it in the current commentary.

Mr. Tladi said that he agreed with the proposal to delete the phrase "or legally binding". The agreements in question might well be legally binding between the parties, but might not be conclusive as to the interpretation of the treaty.

Mr. Park said that he would support maintaining the phrase "legally binding", which reflected the language of draft conclusion 10 (1).

Mr. Nolte (Special Rapporteur) said that, in the spirit of compromise, he would suggest deleting the words "legally binding" in the first instance and the words "conclusive or" in the second instance; in the latter case, the notion of conclusiveness was obvious from the reference to draft conclusion 10.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Tladi said that the sentence beginning "Whereas Waldock's original view" should be deleted because, first, it was incorrect and, second, it contradicted the previous

paragraph, in which it was stated that subsequent agreements and subsequent practice were not necessarily conclusive. The sentence seemed to suggest that such agreements were conclusive as to the interpretation in that once a subsequent agreement had been reached between parties that they considered to be legally binding, that was the only thing that mattered for the purposes of interpretation; a legally binding agreement would therefore be conclusive. He did not agree with that line of thought.

Mr. Park said that the second sentence of the second part of the paragraph, starting with "It is, however," was not readily understandable. He suggested replacing the phrase "without satisfying" with the "that does not satisfy" and deleting the phrase "without such domestic law affecting, as a general rule, the binding character of an agreement under international law", which was unnecessary.

Mr. Rajput said that he would appreciate an explanation of the relevance of the second sentence to the first sentence of the paragraph.

Sir Michael Wood said that he supported Mr. Tladi's statement. The entire second part of the paragraph was unclear and went into unnecessary detail; he would therefore propose ending the paragraph after the block quotation by Sir Humphrey Waldock.

Mr. Murphy said he did not believe that the sentence describing "Waldock's original view" was correct: Sir Humphrey Waldock had not been arguing that agreed practice "would appear to be decisive". If the second part of the paragraph were to be retained, he would propose redrafting the beginning of the first sentence to read "Whereas Waldock's original view that subsequent practice establishing an agreement regarding interpretation", followed by the quote contained in the sentence as originally drafted. He further suggested replacing the word "must" with "may" throughout the second part of the paragraph. However, it would be far preferable for the Commission either to delete the second sentence or to delete both sentences that followed the quote by Sir Humphrey Waldock.

Mr. Nolte (Special Rapporteur) said that while he stood by the paragraph as originally drafted, he would agree to delete the part that followed the block quotation by Sir Humphrey Waldock; in his view, such an amendment would not change the substance of the paragraph as a whole.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Rajput said that the first sentence gave the impression that, unless there was a specific reference within a treaty to the possibility of arriving at a binding subsequent interpretative agreement by the parties, there could be no such agreement. He therefore suggested replacing the phrase "particularly clear in cases in which the treaty itself so provides" with "expressly recognized in some treaties".

Mr. Nolte (Special Rapporteur) said that the words "particularly clear" indicated that it was possible in other cases. Therefore, he would prefer to keep the sentence as originally drafted.

Mr. Jalloh said that he supported the proposal by Mr. Rajput, which clarified the meaning of the first sentence.

Mr. Nolte (Special Rapporteur) said that he could live with the amendment proposed by Mr. Rajput, although he was not convinced by it.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Sir Michael Wood said that in the first sentence the phrase "more or less authoritative" was unclear; he therefore proposed deleting the words "more or less".

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

Mr. Tladi said that, in the last sentence of the paragraph, the phrase "if they refer to, reflect or trigger" should be changed to "if they give rise to or reflect", consistent with the language contained in the relevant later draft conclusion.

Mr. Murphy said that the reference, in footnote 64, to draft conclusion 12 was not correct; it was draft conclusion 13 which contained the language "give rise to, or refer to,". He therefore suggested that the reference should be corrected and that the appropriate language should be used in the current paragraph.

Mr. Nolte (Special Rapporteur) said that, while it was true that draft conclusion 13 referred to treaty bodies and therefore contained relevant language, the last sentence of paragraph (11) referred not only to treaty bodies, but also to international courts and tribunals. The reason the verb "refer to" had been proposed originally was to tone down the significance of the pronouncements of treaty bodies; however, that was not appropriate with regard to the decisions of international courts and tribunals, whose judgments might reflect the identification of subsequent agreements and subsequent practice as authentic means of interpretation. Therefore, he would be in favour of adopting the language proposed by Mr. Tladi and referring to draft conclusions 12 and 13 in footnote 64.

Sir Michael Wood proposed that, in the third sentence, the word "rather" should be deleted and the words "most often" be replaced with "including".

The Chair said that the paragraph did not state that the authority of the courts derived from other sources; rather, it was the authority of interpretation by the courts that was at issue.

Mr. Murphy said that, while he understood the Special Rapporteur's position, he would suggest replacing the phrase "refer to, reflect or trigger" with "reflect, give rise to or refer to", to account for the pronouncements of international courts and tribunals, on the one hand, and expert treaty bodies, on the other.

The Chair said he took it that the Commission wished to adopt the amendments proposed by Sir Michael Wood relating to the third sentence of the paragraph and the latest amendment proposed by Mr. Murphy relating to the last sentence of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

The meeting rose at 1 p.m.